IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 641 of 2003
With
FIRST APPEAL No. 642 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

NEW INDIA ASSURANCE CO LTD. - Appellant(s)
Versus
JAGDISH PARSHOTTAM & 2 - Defendant(s)

==========

Appearance : [F.A. No. 641 of 2003]
MR BINIWALE for MR RAJNI H MEHTA for Appellant(s) : 1,
MR AMAR D MITHANI for Defendant(s) : 1 – 3.

Appearance : [F.A. No. 642 of 2003]
MR BINIWALE for MR RAJNI H MEHTA for Appellant(s) : 1,
MR AMAR D MITHANI for Defendant(s) : 1 - 3.

==========

CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 18/09/2006

ORAL COMMON JUDGMENT

Leave to amend in First Appeal No. 642 of 2003.

1. Since both these appeals arise from the common judgment and in respect of the proceedings arising from the accident which occurred on 23rd September, 1990, they are heard together and now they are being disposed of by this common judgment. First Appeal No. 641/2003 is filed by the Insurance Company against the judgment and award made by MACT [Auxi], Veraval in MACP No. 209/99 and First Appeal No. 642/2003 is filed also by the insurance company against the judgment and award made by the same Tribunal in MACP No. 210/99. The Insurance Company has challenged the judgment and award since the Tribunal has saddled it with the liability to satisfy the award.

2. These proceedings have arisen because the original claimants were travelling in the tanker bearing registration No. GTW 3739 on 23rd September, 1990. They were coming from Talala to Veraval. It was being driven by respondent no. 1. The allegation is that he drove the vehicle rashly and negligently and as a result of the same, the vehicle turned turtle and the passengers travelling in it sustained injuries. The said vehicle was insured with the appellant.

3. So far as MACP No. 209/1999 is concerned, respondent no. 3 of First Appeal No. 641/2003 is the original claimant. He has stated that the accident was

caused due to negligence of respondent no. 1 and in the accident he suffered fracture of vertebra and the resultant permanent disability. According to him he was doing agricultural work and was working as `Pasayata' and was earning Rs.1,000=00 per month. He had claimed Rs.50,000=00 by way of compensation.

4. Respondent no. 3 of First Appeal No. 642/2003 is the claimant of MACP No. 210/1999. He was also travelling in the said tanker. On account of the accident he suffered fracture of the right wrist, his vein was cut and he suffered permanent disability. At the relevant time, he was serving in the Central Warehouse Corporation as Operator and was earning Rs.1,700=00 per month. He prayed for compensation of Rs. 1 lakh.

5. The original opponents i.e., appellant and respondents no. 1 and 2 resisted the claim petitions by filing written statement. The say of respondent no. 1 was that he was not rash or negligent in driving the vehicle. He further stated that the claimants of the aforesaid MACPs were travelling in the tanker as members of the Co-operative Society (Mandli) to take care of the milk. Opponent no. 2 stated that he had categorically instructed the driver not to carry passengers in the tanker. He denied his liability and prayed that the

Insurance Company may be saddled with the liability. The Insurance Company i.e., the appellant original opponent no. 3 pleaded that there was violation of the terms/conditions of the policy and, therefore, prayed for dismissal of the application of the claimants. The Tribunal on the basis of the evidence oral as well as documentary led before it, held that the driver i.e., respondent no. 1 was rash and negligent in driving the tanker. The Tribunal assessed the compensation at Rs.12,250=00 so far as MACP No. 209/99 is concerned and Rs.61,000=00 for the claimants of MACP No. 210/99. As stated above, the respondents were held jointly and severally liable to satisfy the award. Hence, the Insurance Company has approached this Court by way of these appeals.

6. I have heard Mr. Biniwale learned advocate for the appellant and Mr. Mithani learned advocate for the respondents. Mr. Biniwale submitted that considering the facts and circumstances of the case, it is very clear that the tanker being goods vehicle was not permitted to carry passengers. Hence, there was breach of conditions by the driver as well as the insured. It is his submission that when there is breach of conditions, the Insurance Company stands absolved from its liability to satisfy the award. Mr. Biniwale has placed reliance on

the decision of the Apex Court in the case of **Smt. Mallawwa etc., v. Oriental Insurance Co., Ltd., reported in A.I.R., 1999 S.C. pg. 589** and also on the decision rendered by the Apex Court in the case of **New India Assurance Co. Ltd., v. Asha Rani & Ors., reported in A.I.R., 2003 S.C. pg. 607.**

7. Having perused the judgment and record and proceedings of the case, it clearly appears that there is no dispute that the original claimants of MACP No. 209/90 and MACP No. 210/90 were travelling as passengers in the tanker. It is also an admitted decision that the vehicle over turned while it was travelling from Talala to Veraval causing injuries to the passengers being carried in it. In these circumstances, the claimants of the aforesaid two petitions received injuries. Now the question is whether the accident occurred due to rash and negligent driving of respondent no. 1. The Tribunal has framed the issue to the effect that whether on the date of the accident, respondent no. 1 drove the vehicle rashly and negligently. This issue has been decided in affirmative by the Tribunal. Neither the driver i.e., respondent no. no. 1 nor the owner i.e., respondent no. 2 has challenged this finding in appeal. In view of the same, the said finding becomes final.

8. So far as the compensation assessed by the Tribunal is concerned, it has granted Rs.12,250=00 in MACP No. 209/99. Since this is an appeal by the Insurance Company and which is mainly to question its liability to satisfy the award, the quantum determined by the Tribunal is also not required to be interfered with. The claimants have not preferred any appeal. In view of the same, there is no need for me to discuss the aspects of the negligence and the quantum of compensation in this judgment.

9. The main question is whether the Insurance Company is liable to satisfy the award. Mr. Biniwale has first draw my attention to the decision rendered by the Apex Court in the case of In the case of Smt. Mallawwa etc., v. Oriental Insurance Co. Ltd., (supra), the Apex Court has laid down the interpretation of Section 95 of the Motor Vehicles Act, 1939 [hereinafter referred to as the “Act”]. In the said case, the deceased was travelling in the goods carriage on 6th November, 1990. The said vehicle met with an accident and the passengers travelling in it received injuries. The question, therefore, came for consideration of the Apex Court was with regard to liability of the Insurance Company to satisfy the award. The Apex Court after considering the provisions of Section 95 of the Act laid down as under :-

“10. For the purpose of Section 95, ordinarily a vehicle could have been regarded as vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95 (1) (b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. The High Courts have expressed divergent views on the question whether a passenger can be said to have been carried for hire or reward when he travels in goods vehicle either on payment off are or along with his goods. It is not necessary to refer to those decisions which were cited at the Bar as we find that all the relevant aspects were not taken into consideration while expressing one view or the other. We may only refer to the decision of the Orissa High Court in New India Assurance Co. Ltd., v. Kanchan Bewa, 1994 ACJ 138, where Hansaria, J speaking for the Full Bench observed as under :-

> “18. The aforesaid is not enough to take any view as to whether goods vehicle can or cannot come within the fold of proviso (ii) with which we are concerned. Our primary reason for differing, with respect, with Rajasthan Full Bench is that, allowing goods vehicle to be taken within the fold of proviso (ii) would introduce uncertainties in law as that would depend upon various factors to which we shall advert; the result would be that the law would cease to be certain which it has to be at least in a case of the present

> nature. We have said so because reference to the definition of goods vehicle shows hat the first part of it does not deal with carrying of passengers. It is the second part which speaks about the same and that too when the vehicle is used for such a purpose. The word “use” has been defined in Chambers English Dictionary in its intransitive sense to mean “to be accustomed; (to; used chiefly in the past tense)”; to be in the habit of so doing; “to resort”. Reference to the meaning of this word, as given in the Black's Law Dictionary, 5th Edition, would show that even one user may amount to “use” or it may be that for a thing being said to be “used”, it has to be “employed habitually”.
>
> 22. Thus, to find out whether an insurer would be liable to indemnify an owner of a good vehicle in a case of the present nature, the mere fact that the passenger was carried for hire or reward would not be enough, it shall have to be found out as to whether he was the owner of the goods or an employee of such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to case. Production of such result would not be conducive to the advancement of the object sought to be achieved by requiring a compulsory insurance policy.”

> 11. Though, the conclusion was arrived at after taking into consideration the Orissa Motor Vehicle Rules, in our opinion the said view is correct, even otherwise also. In view of what we have said, the contrary view expressed by other High Courts has to be regarded as incorrect.”

9.1. Mr. Biniwale has also placed reliance on the decision of the Apex Court in the case of New Indian Assurance Co. Ltd., v. Asha Rani & Ors., (supra),

wherein, the Apex Court has again considered the liability of the Insurance Company to pay the compensation, in the case where the victim person is travelling in the goods vehicle along with his goods. The Apex Court has laid down as under:

> “In view of the changes in the relevant provisions in 1988 Act vis-a-vis 1939 Act, the meaning of the words “any person” must also be attributed having regard to the context in which they have been used i.e., `a third party'. Keeping in view the provisions of 1988 Act, it can be said that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle tog et his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor. An owner of a passenger carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio in the decision in New India Assurance Company v. Satpal Singh, 1999, AIR SCW 4437 is taken to to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.”

9.2. Thus, it can be seen that the Apex Court has in no uncertain terms laid down the ratio that in the event of any accident occurring to passenger travelling in a goods vehicle either with goods or without it, and sustaining injuries, or fatality, the insurance company will not be liable to pay the compensation to the victim,

unless additional premium to cover risk of such passengers is paid. The victim will have the right to recover the amount from the owner, insured. When this is the position, obviously, it appears that the view taken by the Tribunal is not supported by any judgment of the Apex Court. On the contrary, the decisions referred to above, are totally contrary to it. Hence, it is very obvious that the Tribunal has committed error in holding the Insurance Company liable for satisfying the award.

9.3. The next question is whether the Insurance Company can totally escape from its liability or it may give it right to recover the amount from the insured after initially at first instance satisfying the award and paying compensation to the claimant.

10. Over and above the same, there is provisions of Section 149 of the Act and in particular, sub-section (4) & (5) thereof and if the case falls within sub-section 2(a) of Section 149 of the Act, the Insurance Company is required to satisfy the award and then proceed against the insured to recover the amount. A conjoint reading of the decisions of the Apex Court referred to above, and also the provisions of Sub-section (4) of Section 149 of the Act, it is no doubt in my mind that the Insurance Company cannot escape its liability to satisfy the award

at first instance and then to recover the amount from the insured, only by filing execution proceedings before the concerned Tribunal, and it has not to approach the Civil Court by filing Civil Suit of recovery for that purpose.

11. The appellant has also submitted that in the event of this Court upholding this contention, regarding any liability of the Insurance Company, it may not be directed to first pay the claimant the awarded amount and to recover it subsequently from the owner. Mr. Biniwale has place reliance on the decision of the Apex Court rendered in the case of **National Insurance Co. Ltd., v. Kusum Rai & Ors., reported in (2006) 4 SCC pg. 250** and also the decision rendered in the case of **National Insurance Co. Ltd., v. Bommithi Subbhayamma & Ors., reported in 2005 [Vol. II) ACJ pg. 721**. In the former case, the Apex Court held that since the driver of the offending vehicle did not possess appropriate licence for travelling commercial vehicle and met with an accident causing death of the minor girl, there was clear breach of the conditions of the policy and the Insurance Company was, therefore, not liable to pay the compensation to the claimants. However, considering the facts and circumstances of the case and in particular, the plight of the parents of the minor deceased girl, the Apex Court declined to interfere under Article 136 of the

Constitution of India, and ultimately granted permission to the Insurance Company to recover the amount from the insured, in the manner as was directed by it in Nanjappan's case. Hence, this decision of the Apex Court will not lend any support to the appellant. In the latter case, the Apex Court has held that for death of gratuitous passenger travelling in the truck on account of the accident, the Insurance Company will not be liable to satisfy the award. The Apex Court has said that the claimants would be at liberty to recover the amount from the owner/insured. However, in these decisions, the Apex Court has not laid down any ratio to the effect that it is not necessary for the Insurance Company to first satisfy the claimant and then recover the amount from the insured. In other words, in this decision, the Apex Court has not positively laid down that it is not the judgment of the Insurance Company to first satisfy the claim of the claimant and to recover the amount from the insured in the manner as directed in the case of Nanjappan's case. This decision also will not render much assistance to Mr. Biniwale. Moreover, the decisions referred above i.e., in the case of Oriental Insurance Co. Ltd., v. Nanjappan & Ors., (supra),& in the case of New India Assurance Co. Ltd., v. Asha Rani & Ors.,(supra) the cases are rendered by the Bench comprising three learned Judges of the Apex Court whereas, in the present case, it

is of two learned Judges. Hence, the decisions of the Larger Bench will prevail.

11.1. So far as the decision of the Division Bench of this Court rendered in the case of National Insurance Co. Ltd., v. Minor Harikrishna Punambhai and in the case of Oriental Fire and General Insurance Co. Ltd., v. Natha Kala Dhokiya (supra) are concerned, the Division Bench has stated that if the amount is already paid by the Insurance Company, it may not be recovered by it. This observation is made in the case of National Insurance Co. Ltd., v. Minor Harikrishna Punambhai. However, part of the amount has already been paid to the claimant in the present case and rest of the amount has been deposited in the Tribunal. It may also be noted here, that in the case of Oriental Fire and General Insurance Co. Ltd., v. Natha Kala Dhokiya, same view has been taken and the amount deposited is ordered to be refunded to the Insurance Company. Further both these decisions have been rendered prior to the decisions of the Apex Court referred to above i.e., in the case of Oriental Insurance Co. Ltd., v. Nanjappan & Ors., (supra), in the case of New India Assurance Co. Ltd., v. Asha Rani & Ors.,; in the case of National Insurance Co. Ltd., v. Swaran Singh & Ors., & in the case of M/s, National Insurance Co. Ltd., v. Baljit Kaur & Ors.,

(supra). In the decisions of the Apex Court, it is clearly stated that at the first instance, the Insurance Company will satisfy the award and make payment to the appellant and then recover the amount from the insured/owner. In view of the same, the decisions of the Division Bench of this Court will be of no use to Mr. Biniwale.

12. Recently i have delivered the judgment in the case of New India Assurance Co. Ltd., v. Bhikabhai Bimsibhai Solanki & Ors., in First Appeal no. 403/90 dated 15-18/ September, 2006, wherein, the same issue is extensively discussed by me and I have held that if payment is made to the claimant or amount is deposited in the Tribunal the insurance company may not be permitted to have the amount back from the claimant or the Tribunal but it may be directed to first satisfy the award and then to execute decree against the insured, as directed in in the case of Oriental Insurance Co. Ltd., v. Nanjappan & Ors., (supra). In view of the same, the Insurance Company will also be required to satisfy the award *vis-a-vis*, the claimants and then to recover the amount from the insured by filing appropriate execution proceedings. The result is that these appeals are allowed, subject to the directions given above.

R & P to be re-transmitted to the Tribunal

forthwith.

[Akshay H. Mehta, J.]

/phalguni/